Appendix A

In the United States Court of Appeals
For the Ninth Circuit

No. 78-2280

United States of America, Plaintiff-Appellant

vs.

Michael J. Conway, Defendant-Appellee

[Filed July 10, 1979]

Before: MERRILL and CHOY, Circuit Judges, and
BONSAL, District Judge

ORDER

In the above case Judge Choy has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc; Judge Merrill has voted to deny rehearing and recommend rejection of the suggestion for rehearing en banc; and Judge Bonsal has abstained from voting on the petition for rehearing, but adheres to the position expressed in his dissent.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix B

Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

June 30, 1980

Thomas Steel, Esq.
Law Offices of Michael Kennedy
2424 Pine Street
San Francisco, CA 94115

RE: United States
v. Michael J. Conway
No. 79-393

Dear Mr. Steel:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *United States v. Salvucci*, 448 U.S. ..... (1980) and *Rawlings v. Kentucky*, 448 U.S. ..... (1980)."

Very truly yours,
MICHAEL RODAK, JR., Clerk

By /s/ FRANCIS J. LORSON
Deputy Clerk

Appendix C

In the United States Court of Appeals
For the Ninth Circuit

No. 78-2280

United States of America,
Plaintiff-Appellant,

vs.

Carlo J. Mazzelli and Michael J. Conway,
Defendants-Appellees.

[Filed Oct. 9, 1980]

ORDER

Before: MERRILL and CHOY, Circuit Judges,
and BONSAL,* District Judge

The Supreme Court has vacated our judgment herein, in which we affirmed the district court in granting appellees' motion to suppress certain evidence as the fruit of an unlawful search. The case was remanded for reconsideration in the light of *United States v. Salvucci*, 448 U.S. ..... (1980), and *Rawlings v. Kentucky*, 448 U.S. ..... (1980). Under the rule established by those cases appellee Conway's proprietary interest in the contraband contained in his codefendant's suitcase did not confer standing, and the order granting Conway's motion to suppress upon the ground of such interest was error.

In the district court, Conway had asserted a second ground for standing: that he had purchased the luggage in

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*Honorable Dudley B. Bonsal, Senior Judge, United States District Court for the Southern District of New York.

question and had a reasonable expectation of privacy in it, which expectation was violated by a search. This assertion was challenged by the government, but the dispute was not reached by the district court and the government was given no opportunity to examine Conway respecting his asserted purchase.

The order granting the motion to suppress is vacated and the matter is remanded for further proceedings.

The government's motion for summary reversal and remand for trial is denied. Judge Bonsal would grant the government's motion and limit the remand to trial of Conway without further hearing on the motion to suppress.

Appellee's motion for leave to file additional briefs is denied.

Appendix D

In the United States District Court For the
Northern District of California

CR-78-132 RHS

United States of America,
Plaintiff,

vs.

Michael J. Conway,
Defendant.

[Filed Jan. 5, 1981]

DECISION

Upon remand from the Court of Appeals, we are directed to determine whether defendant has standing to move to suppress the evidence produced upon the search of luggage carried into San Francisco by Mazzelli.

Conway now claims that the luggage and its contents were his, or, at least, his and Mazzelli's, and that he had a reasonable expectation of privacy in it.

The evidence tendered in support of the motion is not convincing. Conway and Mazzelli have, from time to time, tailored their testimony to meet the essential requirements of their motions, and neither is a totally creditable witness.

A fair reading of the evidence indicates that Conway went to Florida to find and purchase cocaine, with the intention of selling it to Mazzelli or his principals. Conway was successful in acquiring seven pounds of cocaine. Mazzelli traveled from California to Florida to inspect and

take possession of the cocaine, to carry it back to California, and to arrange for payment to Conway. Conway went along to see to it that the cocaine did not leave Mazzelli's possession until Conway was paid. Mazzelli had, except for Conway's "security interest", complete possession and control over the bags in which the cocaine was packaged. He carried into the Miami Airport, checked it in, had the claim checks, retrieved it in San Francisco, and admitted his ownership to the authorities in San Francisco. His claim that he did not know the combinations to the bags is inherently incredible. He tacitly admitted to the agents in San Francisco that he knew the combinations but he simply refused to reveal them to the agents.

Whether Conway had originally purchased the bags is immaterial. The bags were merely the packaging for the cocaine, and were delivered to Mazzelli with the intention that they and their contents should be his, contingent only upon the promised payment being made.

While it has been assumed that payment had not yet been made, and that Conway had some security interest in the cocaine, the only evidence thereof is Conway's testimony to that effect. As has been pointed out, his testimony is of marginal creditability. The acceptable evidence is equally consistent with a finding that the transaction was completed in Florida, that Conway had no further interest of any kind in the bags or their contents, and that he was no more than a travelling companion of Mazzelli on the flight returning to California.

In any event, he had relinquished the bags and any expectation of privacy in their contents. It follows that he is

without standing to move to suppress, and the motion is denied on that ground.

Counsel and the defendant shall appear before this Court on Friday, January 16, 1981, at 9:30 a.m., at which time this matter will be set for trial.

Dated: December 31, 1980

/s/ Robert H. Schnacke
United States District Judge

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 81-1254X
DC# CR 78-132-2

United States of America,
Plaintiff-Appellee,

vs.

Michael J. Conway,
Defendant-Appellant.

[Filed Jan. 14, 1982]

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding
Argued and Submitted December 17, 1981

Before: KILKENNY, WALLACE, and SNEED,
Circuit Judges

Conway was convicted of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. This court had previously affirmed an order suppressing evidence, *United States v. Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), but the United States Supreme Court vacated the decision and remanded it for further consideration in light of *United States v. Salvucci*, 448 U.S. 83 (1980), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980). *United States v. Conway*, 448 U.S. 902 (1980). The trial court on remand admitted the evidence. On appeal Conway contends that

(1) he had standing to object to an illegal search of his companion's suitcase because he had a legitimate expectation of privacy in the suitcase, (2) his statements were improperly admitted because they were tainted by an illegal detention and arrest, and (3) his statements were taken in violation of *Miranda*.

We hold that the trial court did not err in concluding that Conway has no standing to object to the suitcase search. We also hold that assuming, without deciding, the trial court erred in admitting Conway's statements, the error was harmless beyond a reasonable doubt. We therefore affirm the conviction.

I.

STANDING

Conway, an attorney, traveled to Florida, where he met a companion, Mazzelli, and placed cocaine in a briefcase which was placed inside a suitcase. The two traveled together on an airplane to San Francisco. Conway had not yet been paid for the cocaine. At the San Francisco airport they separated. Each was arrested while apart from the other, and the suitcases each possessed were searched. A suitcase carried by Mazzelli contained seven pounds of cocaine. Mazzelli had checked this suitcase in at Miami, claimed it in San Francisco, and was carrying it when arrested. It was searched without a warrant or probable cause.

Conway claims a legitimate expectation of privacy in the Mazzelli suitcase. In support of this claim, he alleges that he purchased the suitcase and briefcase, and placed the cocaine inside the briefcase and the briefcase inside

the suitcase; that some of his clothing was in the suitcase; and that he was traveling with Mazzelli for the very purpose of excluding others from possession of the cocaine until he was paid for it. The district court made no findings on the alleged purchase and packing of the suitcase, nor on whether Conway's clothing was in it. The court found that in any event, Conway had relinquished the suitcase and any expectation of privacy he might have had in its contents.

In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the defendant dumped his drugs into the purse of an acquaintance minutes before the police arrived on the scene. He was held not to have a legitimate expectation of privacy in the purse, and thus did not have standing to object to its search.

The district court in the instant case made a factual determination that the cocaine and suitcases had been turned over to Mazzelli, and that Conway's only remaining interest was to get a share of the proceeds. In light of *Rawlings*, we find that on these facts, Conway had no legitimate expectation of privacy in the suitcase carried by Mazzelli, and thus that he has no standing to object to its search

II.

HARMLESS ERROR

Conway also claims that the district court clearly erred in refusing to suppress the following two statements made by him during his detention at San Francisco airport:

1. "You'll be arresting me for conspiracy then," made while Conway was detained in an airport storage room immediately after he was informed of the discovery of the cocaine in Mazzelli's suitcase.

2. Conway's denial that he knew Mazzelli, made after the discovery of cocaine and after his formal arrest.

His initial detention was without a warrant or probable cause, and he contends his statements were the fruit of his illegal arrest. The district court refused to suppress the statements, finding that the arrest became legal when the cocaine was discovered in Mazzelli's suitcase, and that both statements were made after the arrest became legal.

We do not find it necessary to decide whether Conway's Fourth and Fifth Amendment rights were violated by the admission of these statements. We hold that even if it be assumed that the district court erred in admitting the statements, the error was harmless beyond a reasonable doubt. *See United States v. Castillo*, 615 F.2d 878 (9th Cir. 1980); *Chapman v. California*, 386 U.S. 18, 24 (1967).

The two statements admitted were as consistent with innocence as with guilt when made. Conway's argument that admission of his statement denying acquaintance with Mazzelli was not harmless because it evidenced a guilty mind, precluding him from establishing that he was an innocent traveling companion to Mazzelli, is not convincing in light of properly admitted evidence to the contrary. Evidence was admitted that Conway was a suspected cocaine dealer, that the pair had acted suspiciously at both airports, that both had given false accounts of their activities in Miami, and that Conway's were the only fingerprints found on the cocaine. This evidence convinces us that the admission of the two statements in question was harmless beyond a reasonable doubt.

AFFIRMED.

Appendix F

United States Court of Appeals
For the Ninth Circuit

No. 81-1254X

United States of America,
Plaintiff-Appellee,

vs.

Michael J. Conway,
Defendant-Appellant.

[Filed March 11, 1982]

ORDER

Before: KILKENNY, WALLACE, and SNEED, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix G

United States Court of Appeals
For the Ninth Circuit

No. 81-1254X

United States of America,
Plaintiff-Appellee,

vs.

Michael J. Conway,
Defendant-Appellant.

[Filed March 15, 1982]

ORDER

Appellant's motion to stay mandate pending application for writ of certiorari is denied.

/s/ Joseph T. Sneed
United States Circuit Judge